Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY,

Petitioners,

v.

CENTRAL POWER & LIGHT COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, SOUTHWESTERN ELECTRIC POWER COMPANY, WEST TEXAS UTILITIES COMPANY, CITY OF ALTUS, OKLAHOMA, CITY OF FREDERICK, OKLAHOMA, CITY OF CORDELL, OKLAHOMA, CITY OF MANNFORD, OKLAHOMA, VERDIGREE VALLEY ELECTRIC COOPERATIVE, INC., INDIAN ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC SYSTEMS OF OKLAHOMA, ARKANSAS ELECTRIC COOPERATIVE CORPORATION, FEDERAL ENERGY REGULATORY COMMISSION, HOUSTON LIGHTING & POWER COMPANY, CITY OF SAN ANTONIO, LOWER COLORADO RIVER AUTHORITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	3
Statement of the Facts	3
Reasons for Granting the Writ	8
I. The Court of Appeals erred as a matter of law in refusing to resolve the scope of the Commission's jurisdiction	9
II. The remand by the Court of Appeals flies squarely in the face of clear statutory language and intent	12
III. The remand by the Court of Appeals contradicts this Court's decision in *Connecticut Light & Power Company v. FPC*	14
Conclusion	16
Certificate of Service	19
Appendix A — Decision of the United States Court of Appeals for the District of Columbia Circuit, dated April 10, 1978	A-1
Appendix B — Order of the United States Court of Appeals for the District of Columbia Circuit, denying a Rehearing, dated May 26, 1978	B-1
Appendix C — Decision of the Federal Power Commission in its Docket No. E-9558, dated July 21, 1976	C-1
Appendix D — Order of the Federal Power Commission denying a Rehearing, dated September 17, 1976	D-1
Appendix E — Sections 201 and 202 of the Federal Power Act	E-1
Appendix F — Amended Final Order of the Texas Public Utility Commission, dated July 11, 1978	F-1
Appendix G — Summary and Status of Related Proceedings	G-1

TABLE OF AUTHORITIES

Cases

	Page
Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974)	10
Connecticut Light & Power Company v. FPC, 324 U.S. 515 (1945)	9, 14, 15, 16
FPC v. Florida Power & Light Co., 404 U.S. 453 (1972)	16
Social Security Board v. Nierotko, 327 U.S. 358 (1946)	9
Stark v. Wickard, 321 U.S. 288 (194[illegible])	9
Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 98 S. Ct. 1197 (1978)	11
Alabama Power Company v. FPC, 511 F. 2d 383 (1974)	10
Kurzon v. United States Postal Service, 539 F. 2d 788 (1 C.A. 1976)	10
Martin v. Federal Security Agency, 73 F. Supp. 482 (W.D. Pa. 1947)	9
J. B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (D. Colo. 1962)	9
Connecticut Light & Power Company, 6 F.P.C. 104 (1947)	15

Statutes

Federal Power Act, Section 201, 16 U.S.C. § 824	2, 3, 12, 13
Federal Power Act, Section 202, 16 U.S.C. § 824a	2, 3, 13, 14
Federal Power Act, Section 313, 16 U.S.C. § 825*l*	2
Public Utility Regulatory Act, Tex. Ver. Code Ann. Art. 1446c	4

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The Petitioners, Dallas Power & Light Company (DP&L) Texas Electric Service Company (TESCO), and Texas Power & Light Company (TP&L), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 10, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 575 F. 2d 937 (D.C. C.A. 1978) and is attached hereto as Appendix A. The unreported order of the Court of Appeals, denying a timely Petition for Rehearing and Alternatively Suggestion for Rehearing En Banc, is attached as Appendix B. The unreported decision of the Federal Power Commission (now the Federal Energy Regulatory Commission) (Commission), issued July 21, 1976, in Federal Power Commission Docket No. E-9558, is attached as Appendix C, and the Commission's unreported order denying a rehearing, issued September 17, 1976, is attached as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 10, 1978. A timely petition for a rehearing *en banc* was denied on May 26, 1978. The jurisdiction of the Court of Appeals was invoked pursuant to § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). This petition, seeking a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia, was timely filed within 90 days of May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTION PRESENTED

The sole question presented for review is whether the Federal Power Act (Act) delegates to the Commission any power to exercise jurisdiction over electric utility companies which, at the time of the Commission's decision and at all subsequent times, neither own nor operate any facilities outside a single state and which neither, directly nor indirectly, transmit nor sell, at wholesale or retail, any electric energy in interstate commerce.

STATUTORY PROVISIONS INVOLVED

Sections 201 and 202 of the Federal Power Act, 16 U.S.C. § 824 and § 824a, are set forth as Appendix E.

STATEMENT OF THE FACTS

All facts relevant to a resolution of the jurisdictional status of DP&L, TESCO and TP&L under the Act are admitted by all parties and were not in dispute at the Court of Appeals.

DP&L, TESCO and TP&L are electric utility companies engaged in the generation, transmission, distribution and sale of electric energy solely in the State of Texas. Texas Utilities Company owns 99.6% of the common stock of DP&L and all the common stock of TESCO and TP&L. DP&L serves the City of Dallas and three adjoining incorporated communities within Dallas County. TESCO serves customers in 47 counties in north-central and west Texas, including the cities of Fort Worth, Wichita Falls and 71 other incorporated municipalities. TP&L serves customers in 51 counties in north-central and east Texas, including 259 incorporated municipalities. DP&L, TESCO and TP&L are referred to collectively as the TU Companies.

The TU Companies neither own nor operate facilities located outside the State of Texas which are used in the generation, transmission, distribution or sale of electric power. Moreover, the TU Companies have historically arranged the operation of their electrical systems to confine their operations solely to the State of Texas.[1]

[1] During World War II and the Korean Conflict, the TU Companies were interconnected to interstate systems under exemptions from the Act. On a limited number of other occasions during the existence of an electrical emergency, the TU Companies have provided emergency interconnected service to other systems operating in interstate commerce. On each such occasion, an exemption from jurisdiction under the Act has been obtained.

Houston Lighting & Power Company (HL&P) is an electric utility company engaged in the generation, transmission, distribution and sale of electric energy in the Texas Gulf Coast Region, including the cities of Houston, Galveston, and 151 other cities, villages and communities.

Central Power & Light (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO) and West Texas Utilities Companies (WTU) are wholly owned subsidiary corporations of Central and South West Corporation (CSW), and each is an electric utility company engaged in the generation, transmission, distribution and sale of electric energy. CP&L serves customers in 44 communities in southern Texas, including the city of Corpus Christi. WTU serves customers in 50 counties in central and west Texas, including the city of Abilene. All of the facilities of CP&L and WTU are located solely within the State of Texas. PSO serves customers in eastern and southwestern Oklahoma, including the city of Tulsa. SWEPCO serves customers in northwestern Louisiana, northeastern Texas and northwestern Arkansas, including the city of Shreveport, Louisiana.

The TU Companies, HL&P, CP&L and WTU are each an electric utility within the meaning of the Texas Public Utility Regulatory Act (Tex. Ver. Code Ann. Art 1446c) and as such are subject to the jurisdiction of the Texas Public Utility Commission.

Electric utility companies frequently interconnect with neighboring electric utility systems to prevent the unexpected interruption of electric service to their customers as a result of lost generation or transmission due to natural calamities, equipment failures or other causes. Interconnections among electric utilities in Texas have developed into a compact electrical network consisting of electric systems with generation capacity exceeding 30,000 megawatts. This interconnected group of electric utilities is known as the Electric Reliability Council of Texas (ERCOT), one of nine regional electric system coordinating councils located throughout the United States designed to promote coordinated and long-range planning among such utilities. ERCOT consists of the TU Companies, HL&P, CP&L, WTU, the Lower Colorado River Authority, the electric utility system owned by the city of Austin, the City Public Service Board of San Antonio, which operates the electric utility system owned by the city of San Antonio, and various other municipally-owned electric systems and cooperatives located throughout the state of Texas.

Prior to May 4, 1976, the electric systems in ERCOT and all systems interconnecting any ERCOT system, operated solely within the state of Texas[2].

On May 4, 1976, at approximately 5:30 a.m., WTU unilaterally and without prior notice to anyone, wired around an electrical switch at the Vernon, Texas, substation which thus permitted electric energy to flow from Texas into

[2] While WTU did not own any facilities located outside the State of Texas, it did maintain interconnections with PSO at the Texas-Oklahoma border. To avoid interstate operation, WTU historically operated as two separate systems — an interstate system and a Texas intrastate system. The interstate system includes a portion of its service area adjacent to the State of Oklahoma and lying along the Texas-Oklahoma boundary from north of Shamrock to east of Vernon, Texas. WTU's interstate facilities were so structured as to permit it to operate in synchronism with either its Texas intrastate system or with PSO but never in synchronism with both its Texas intrastate system and interstate system simultaneously. A contract covering the interconnections between TESCO and WTU, entered into in 1938, requires both parties to notify the other prior to the commencement of interstate operations in order to permit the other party to disconnect, a right clearly provided in the contract, in order to limit its operations to the State of Texas, free of the Commission's jurisdiction.

Oklahoma, and simultaneously disconnected PSO's facilities, thereby preventing electricity generated in Oklahoma to flow into Texas. Thereafter, WTU's previously intrastate facilities began serving three small communities in Oklahoma theretofore served by PSO. This action of WTU was, without dispute, a clear violation of the WTU-TESCO agreement. See note 2.

Until 3:43 p.m. on May 4, 1976, the TU Companies and HL&P remained interconnected with WTU and with the other member systems of ERCOT.

By 3:43 p.m. on May 4, 1976, all interconnections, directly or indirectly, of the TU Companies with WTU and CP&L were separated so that the TU Companies thereafter operated electrically isolated from all systems operating either directly or indirectly in interstate commerce or subject to the jurisdiction of the Commission. These facts are undisputed.

Since 3:43 p.m. on May 4, 1976, the TU Companies have not owned or operated any facilities used in the transmission, sale, receipt or delivery of electric energy in interstate commerce, have not transmitted or sold, at wholesale or retail, electric energy outside the state of Texas, and have not been interconnected, directly or indirectly, with the facilities of any other system used for the transmission or sale of electric energy in interstate commerce which could subject the TU Companies to the jurisdiction of the Commission.[3]

[3] On May 2, 1977, the Texas Public Utility Commission, after a full hearing on the merits, ordered all electric systems to return to the historical intrastate mode of operation which existed prior to May 4, 1976. Since May 4, 1977, that mode of operation has been restored and all interconnection between the ERCOT systems remain in place. The Amended Final Order of the Texas Public Utility Commission dated July 11, 1977, is attached as Appendix F.

On May 4, 1976, at approximately 9:30 a.m., the CSW subsidiaries filed a petition with the Commission seeking, among other things, an order declaring the TU Companies and HL&P jurisdictional by virtue of the surreptitious actions taken by WTU four hours earlier.

Based upon the undisputed facts, the Commission found, on July 21, 1976, that it had no power over the TU Companies or HL&P, since at the time of its decision, no factual predicates for the exercise of jurisdiction existed. In so holding, the Commission expressly adopted the conclusions of its General Counsel, whose memorandum was attached to the Commission's decision.

The General Counsel's memorandum sets forth his conclusion quite succinctly:

> My conclusions are fourfold:
>
> Prior to May 4, 1976, the aforementioned four systems were operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were not susceptible to classification as 'public utilities';
>
> During May 4, 1976, from 5:30 a.m. to 3:43 p.m., the aforementioned four systems operated in parallel — or electrical synchronizism [SIC] — with other electric utilities which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were susceptible to review by the Commission as to their 'public utility' status;
>
> *Subsequent to May 4, 3:43 p.m., the aforementioned four systems [the TU Companies and HL&P] have been operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they are not susceptible to classification as 'public utilities';* and,

> During the 10-hour period of synchronous electrical operation on May 4, the facilities and operations of the aforementioned systems were, for all practical purposes, those for the transmission of electric energy in intrastate commerce, . . . and such systems fall within the commission's rule of determining 'public utility' status based upon the overall characteristics of the electric system's operations, notwithstanding some interstate transmission of electric energy. [Emphasis added.]

The Court of Appeals found the basis for the Commission's decision confusing:

> . . . the general counsel's memorandum indicates that the HL&P and TU companies were, at all times, outside the Commission's jurisdiction as a matter of law, i.e., the exercise of jurisdiction was not a matter for the Commission's discretion. But the authorities cited by the general counsel are cases which involved or discussed the Commission's discretion to decline jurisdiction over a firm even though it might have been a public utility within the meaning of the Federal Power Act. 575 F. 2d at 939.

Thus, the court, without deciding the scope of the Commission's jurisdiction, remanded for clarification of its reasoning the order of the Commission, even though the court expressly acknowledged that "a reading of the Commission's decision does not establish that it was purporting to exercise discretion." 575 F. 2d at 939.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred as a matter of law in not deciding the question of jurisdiction on the merits. The remand for clarification of the Commission's reasoning flies squarely in the face of a clear statutory demarcation of jurisdiction beyond which the Commission was prohibited to act. The

remand also contradicts this Court's decision in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1943). Finally, the action of the Court of Appeals raises an issue of critical importance not only with respect to the scope of the Commission's jurisdiction over electrical utilities operating solely in intrastate commerce but also in the delicate balance of federal regulation and complementary state regulation. Consequently, the Court of Appeals' action so far departs from the accepted and usual course of judicial proceedings as to necessitate intervention by this Court with the issuance of a writ of certiorari.

I. The Court of Appeals erred as a matter of law in refusing to resolve the scope of the Commission's jurisdiction.

The threshold issue before the Commission and the Court of Appeals and the sole issue before this Court is the proper scope of the Commission's jurisdiction. All relevant facts necessary to a resolution of this issue are undisputed and admitted.

As this Court has said, the scope of an administrative agency's jurisdiction is to be finally determined by the courts and not by the agency. *See, e.g., Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946); *J. B. Montgomery, Inc. v. United States*, 206 F. Supp. 455, 458 (D. Colo. 1962), *aff'd.*, 376 U.S. 389 (1964); *Martin v. Federal Security Agency*, 73 F. Supp. 482, 489 (W. D. Pa. 1947), *aff'd.*, 174 F. 2d 364 (3 C.A. 1949).

The appellate court is charged with the duty and responsibility to decide jurisdiction and cannot relegate that judicial function to the agency. See *Stark v. Wickard*, 321 U.S. 288, 309-10 (1943).

This Court requires appellate courts to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). Moreover, in *Alabama Power Co. v. FPC*, 511 F. 2d 383 (D.C.C.A. 1974), the Court of Appeals for the District of Columbia Circuit itself said: "We do not review agency action in order to perfect the administrative process to the nth degree. A court should uphold an agency even when its findings lack ideal clarity, if 'the agency's path may reasonably be discerned.' " *Id.* at 392. See *Kurzon v. United States Postal Service*, 539 F. 2d 788 (1 C.A. 1976).

Moreover, the Court of Appeals' search for ideal clarity in this case resulted not only in an unnecessary remand but also in a court confused by its own misapprehension of both the law and the facts. The Court of Appeals read the General Counsel's memorandum as indicating "that the HL&P and TU Companies were, *at all times*, outside the Commission's jurisdiction as a matter of law. 575 F. 2d at 939. (Emphasis added.) The General Counsel's memorandum, however, in unmistakable language, concluded that the TU Companies were "susceptible to review" by the Commission as "public utilities" within the meaning of the Act only during the ten-hour period on May 4, 1976. Thus, the Commission possessed discretion to exercise jurisdiction over the TU Companies only so long as the TU Companies remained interconnected with WTU after WTU began service to the small communities in Oklahoma. When those connections were opened, all power of the Commission to assert jurisdiction ceased.

Moreover, the Court correctly concluded that the decision by the Commission holding that the TU Companies were not jurisdictional did not purport to reflect that the Commission, in so holding, was exercising its discretion. The Court observed that: "It is hornbook law that the court must appraise agency action not on grounds advanced by counsel but on those identified by the agency as reasons for its actions." 575 F. 2d at 938. Nevertheless, the Court became confused because of the oral and written arguments to it by FERC counsel "that the decision not to assert jurisdiction was a proper exercise of agency discretion." 574 F. 2d at 938.

This kind of logical inconsistency by the Court in the face of its demand for perfect clarity of reasoning on the part of the agency is entirely inexplicable. Thus, the remand for clarification of reasoning by the Court might result in a lengthy and totally unnecessary inquiry by the Commission into issues wholly irrelevant to a determination of the Commission's jurisdiction.[4]

The failure of the Court of Appeals to reach the merits of the simple jurisdictional issue raised in this case illustrates that Court's inclination for judicial nitpicking which this Court recently criticized in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 98 S. Ct. 1197 (1978).

The basic issue is stark and simple: May the Commission, as a matter of law, assert jurisdiction over an electric utility where it has no interstate facilities and no interstate transmissions of electric power, simply because at one time, for ten hours and without its knowledge, it may be found to have engaged, indirectly through its interconnections with another, in the interstate transmission of electricity? If it may not, it is an exercise in futility to require the Commission to review the circumstances that would lead it to assert or refuse to assert jurisdiction, since it had no such options.

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[4] A summary of related proceedings is as Appendix G.

Moreover, an explication by the Commission of its rationale in language of "ideal clarity" will not lift from the Court of Appeals and ultimately from this Court the burden of resolving the proper scope of the Commission's jurisdiction. Consequently, the remand serves no logical or legal purpose and merely postpones for a later day the final resolution of an important issue of the scope of federal administrative power over the delivery of electric energy, a matter declared by Congress to be affected with a public interest (Section 201(a) of the Act, 16 U.S.C. § 824(a)) and a matter of intense national concern. This Court should not countenance the refusal of the Court of Appeals to decide the scope of jurisdiction in this case.

II. The remand by the Court of Appeals flies squarely in the face of clear statutory language and intent.

In enacting the Federal Power Act, Congress drew a bright line of demarcation separating matters over which the Commission has jurisdiction and matters over which the Commission possesses no power to act. Congress thereby struck a delicate balance between matters of essentially national concern and matters falling within the scope of local regulation. It is axiomatic that the Commission's jurisdiction is coextensive with the Act; if jurisdiction exists at all, it must flow from the Act. Clearly the Commission has no power, mandatory or discretionary, over matters outside the scope of persons and subject matters delineated in the Act.

A plain reading of the Act is dispositive of the jurisdictional issue in this case. Had the Court of Appeals analyzed the Act, it would have concluded, just as the Commission concluded, that the Commission possessed no power to assert jurisdiction over the TU companies or HL&P as a matter of law.

Section 201(b) of the Act defines the scope of matters covered and the scope of the Commission's power over such matters:

> (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. 16 U.S.C. § 824(b).

Section 201(c) of the Act defines energy transmitted in interstate commerce as

> electric energy . . . transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. 16 U.S.C. § 824(c).

Section 202(b) of the Act defines the power of the Commission to order interconnections among jurisdictional utilities:

> (b) Whenever the Commission, . . . finds such action necessary or appropriate in the public interest it may by order direct a *public utility* (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange

energy with such persons. (Emphasis added.) 16 U.S.C. § 824a (b).

Consequently, the plain meaning and language of the Act results in the conclusion that the Commission has jurisdiction over a utility only so long as the utility is a "public utility" within the meaning of the Act, that no utility is a "public utility" unless it "owns or operates facilities subject to the jurisdiction of the Commission," and that the Commission's jurisdiction extends only to facilities used "for the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."

III. The remand by the Court of Appeals contradicts this Court's decision in *Connecticut Light & Power Company v. FPC.*

This Court has long recognized that the test of jurisdiction must be measured from facts which exist at the time the agency asserts jurisdiction. In *Connecticut Light & Power Company v. FPC*, 324 U.S. 515 (1945) this Court stated:

> Of those facilities which the Commission held subjected the Company to the Power Act at the time it became effective the Company has since divested itself of all but one, *and on that one the Commission rests its present jurisdiction to control petitioner's accounting. Id.* at 519 . . . The order must stand or fall on whether the company owned facilities that *were used* [at the time the Commission found it possessed jurisdiction] *in transmission of interstate power* and which were not facilities in local distribution. *Id.* at 531. (Emphasis added.)

In the present case, the undisputed evidence clearly established that at all times after 3:43 p.m., May 4, 1976, the TU Companies have operated electrically isolated from all systems susceptible to the jurisdiction of the Commission under the Federal Power Act.

Moreover, both this Court and the Commission have specifically recognized the right of utilities susceptible to the Commission's jurisdiction to withdraw therefrom and the right of otherwise non-jurisdictional utilities to so structure their affairs as to remain not susceptible to the Commission's jurisdiction. In *Connecticut*, this Court observed:

> Two days before [the Federal Power Act's] effective date and frankly for the purpose of avoiding federal regulation the Company rearranged its operations with intent to cut every connection and discontinue every facility whose continued operation would render it subject to the Federal Power Commission's control. *The Commission conceded in its opinion and the Government admits here the Company's right to do so.* 324 U.S. at 518-19. (Emphasis added.)

On remand of *Connecticut* by this Court, the Commission repeated the principle that an electric utility had the right to avoid jurisdiction:

> The circumstances of this case illustrate strikingly the manner in which a company, by a series of calculated actions may, step by step, remove itself from the jurisdiction of this Commission. . . . *The Company is now about to remove any remaining shadow of doubt as to its status by cutting its last remaining connection with out-of-state power at its Bristol substation. It will then become wholly intrastate, subject only to jurisdiction of the Connecticut Commission. In so doing the company is clearly within its legal rights. Connecticut Light & Power Company*, 6 F.P.C. 104, 110 (1947). (Emphasis added.)

What Connecticut did by selling the only facility by which it was jurisdictional, the TU Companies did by 3:43 p.m., May 4, 1976, by opening all its interconnections with WTU

and others engage, directly or indirectly, in the sale, transmission, receipt or delivery of electric energy in interstate commerce, thereby electrically confining their operations solely to Texas.

Finally, even under the "electromagnetic" test of jurisdiction announced by this Court in *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972), no jurisdiction exists in this case since no electricity generated in the TU Companies' systems could flow in interstate commerce without the interconnections closed which were opened by TESCO at 3:43 p.m. on May 4, 1976.

CONCLUSION

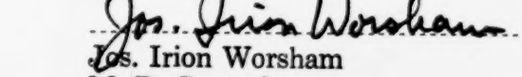
The Court of Appeals committed error in three ways. First, it refused to address the merits of the scope of the Commission's jurisdiction. Second, had it analyzed Sections 201 and 202 of the Federal Power Act, it would have concluded that the Commission had no discretion to exercise since as a matter of law under the undisputed facts the Commission possessed no jurisdiction over the TU Companies. Third, the Court misread both the decision of the Commission and the Federal Power Act and refused to apply this Court's decision in *Connecticut Light & Power Company v. FPC.*

Therefore, unless this Court grants the writ hereby sought, the limits of federal regulatory authority over electric utilities will be brought into question, the scope of complementary state regulation will be cast in doubt and the clear line of demarcation between federal and state authority of the electric utility industry will be made fuzzy. Further, the failure of this Court to correct the clear error of the Court of Appeals may result in the useless proliferation of an

already complex maze of related litigation and will result in the unnecessary postponement of the final resolution of an important issue of critical national concern and importance. Neither the Congress in enacting the Federal Power Act nor this Court in deciding *Connecticut Light & Power Company v. FPC, supra.*, intended such a result. Moreover, neither the electric utility industry nor the public can tolerate such consequences.

For all these reasons, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company pray that this Court grant this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, that this Court reverse the decision of that Court of Appeals and that this Court direct the Court of Appeals to sustain the Commission's determination that it is without jurisdiction over the TU Companies as a matter of law.

Respectfully submitted,



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ATTORNEYS FOR
DALLAS POWER & LIGHT COMPANY
TEXAS ELECTRIC SERVICE COMPANY AND
TEXAS POWER & LIGHT COMPANY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1995

CENTRAL POWER & LIGHT COMPANY,
PUBLIC SERVICE COMPANY OF OKLAHOMA,
SOUTHWESTERN ELECTRIC POWER COMPANY, and
WEST TEXAS UTILITIES COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ARKANSAS ELECTRIC COOPERATIVE CORP.
HOUSTON LIGHTING & POWER COMPANY,
CITY OF SAN ANTONIO,
LOWER COLORADO RIVER AUTHORITY,
DALLAS POWER & LIGHT COMPANY, et al.,
Intervenors,

No. 76-2012

CITY OF ALTUS, FREDERICK, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

DALLAS POWER & LIGHT COMPANY,
HOUSTON LIGHTING & POWER COMPANY,
LOWER COLORADO RIVER AUTHORITY,
Intervenors.

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued February 27, 1978

Decided April 10, 1978

Richard D. Cudahy with whom *Robert H. Loeffler* was on the brief, for petitioners in No. 76-1995. Also *Richard D. Ferguson* and *Paul T. Ruxin* entered appearances for petitioners in No. 76-1995.

Charles F. Wheatley, Jr. and *Robert A. O'Neil* were on the brief, for petitioners in No. 76-2012.

McNeill Watkins, II, for respondent. *Drexel D. Journey*, General Counsel. *Robert W. Perdue*, Deputy General Counsel, *Allan Abbot Tuttle*, Solicitor and *Allan M. Garten*, Attorney, Federal Energy Regulatory Commission were on the brief, for respondent.

Gordon Gooch with whom *Bruce Kiely* and *Steven Huncicker* [sic] were on the brief, for intervenor, Houston Lighting and Power Company in Nos. 76-1995 and 76-2012. Argued on behalf of all intervenors.

Lawrence S. Smith was on the brief for intervenor, Lower Colorado River Authority in Nos. 76-1995 and 76-2012.

Jon C. Wood was on the brief, for intervenor, The City of San Antonio, Texas in No. 76-1995.

Also *Harry A. Poth, Jr.*, *Richard M. Merriman*, and *Peyton G. Bowman, III* entered appearances for intervenor, Dallas Power and Light Company in No. 76-1995 and 76-2012.

Also *Robert Weinberg* entered an appearance for intervenor, Arkansas Electric Cooperative Corp. in No. 76-1995.

Before: McGOWAN, LEVENTHAL and ROBB, *Circuit Judges*.

Opinion Per Curiam.

PER CURIAM: This case involves a challenge to a ruling by the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) that it could not compel interconnection among the West Texas Utilities Company (WTU), the Houston Lighting & Power Company (HL&P), and the Texas Utilities Company (TU) under § 202(b), (c) of the Federal Power Act, 16 U.S.C. § 824a(b), (c) (1976), because it did not have jurisdiction over the latter two companies. All three utilities were members of a Texas intrastate power pool (ERCOT).

There is confusion as to the basis of the FERC's action. The Commission's brief argues that the decision was grounded in material part on the fact that HL&P's and TU's nexus with interstate transmission was the product of a breach of contract: a ten hour period on May 4, 1976, during which WTU transmitted power to an affiliated company in Oklahoma without the knowledge of HL&P and TU and in express violation of a contract between WTU and the Texas Electric Utility Company [sic], a subsidiary of TU. Thus the FERC argues that the decision not to assert jurisdiction was a proper exercise of agency discretion.

One difficulty with this contention is the failure to confront questions as to the legality of the contract. Petitioners' central position is that the agreement among the Texas utilities not to transmit interstate was part of a group boycott in violation of the antitrust laws. While the FERC does not have authority to adjudicate antitrust actions, antitrust

considerations are relevant when it exercises its discretion subject to a public interest mandate. *Gulf States Utilities Company v. FPC*, 411 U.S. 747 (1973), and cases cited therein. There is no evidence in the record that the FERC considered petitioners' antitrust contentions.

Another problem is whether the breach of contract was actually material to the Commission's conclusion. The Commission's order simply states that it adopts the general counsel's conclusion that HL&P and the TU companies are not "public utilities" within the meaning of § 201(e) of the Federal Power Act, 16 U.S.C. § 824(e) (1976). Appendix at 117. Section 201(e) simply defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter." There is no mention of the contract in the general counsel's memorandum. *Id.* at 122-24. It is hornbook law that the court must appraise agency action not on grounds advanced by counsel but on those identified by the agency as reasons for its actions. *SEC v. Chenery Corporation*, 318 U.S. 80, 92-94 (1943).

There is further confusion concerning the basis of the Commission's ruling: the general counsel's memorandum indicates that the HL&P and TU companies were, at all times, outside the Commission's jurisdiction as a matter of law, *i.e.*, the exercise of jurisdiction was not a matter for the Commission's discretion. But the authorities cited by the general counsel are cases which involved or discussed the Commission's discretion to decline jurisdiction over a firm even though it might have been a public utility within the meaning of the Federal Power Act. *Connecticut Light & Power Company v. FPC*, 324 U.S. 515, 536 (1945); Letter of the FPC to Home Light and Power Company, dated May 28, 1965 (Appendix at 127).

In argument to this court in support of the Commission's ruling, FERC counsel contends that what the general counsel intended to indicate in his memorandum was that an exercise of jurisdiction was within the Commission's discretion. He further argues that although the general counsel could not exercise that discretion for the agency, he could make a recommendation, and that that in fact is all he did in this case. Again, a reading of the Commission's decision does not establish that it was purporting to exercise discretion. Furthermore, discretion can be exercised only in light of all the relevant factors. Totally absent from the general counsel's memorandum and the Commission's opinion is any reference to antitrust considerations or any other component of a public interest determination. As the Supreme Court observed in *Gulf States Utilities*, "where the Commission summarily disposes of proffered objections, or where it exercises its discretion . . . without considering . . . anticompetitive consequences, 'the reviewing court must closely scrutinize its action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws.'" 411 U.S. at 763 (quoting *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485, 498 (1967)).

Our judicial function embraces ruling on what we fairly discern as the basis of the Commission's action, but it does not include speculating on the Commission's intentions. *Id.* at 764. We do not say the result reached by the Commission is contrary to law. What we do say is that the FERC has not complied with its obligation to articulate its reasoning. We therefore remand for clarification of that reasoning. In the event exercise of discretion is involved, as was put to us in support of this order, it must be accompanied by some indication in the record that all relevant factors were taken into account.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977
No. 76-1995

CENTRAL POWER AND LIGHT COMPANY,
PUBLIC SERVICE COMPANY OF OKLAHOMA,
SOUTHWESTERN ELECTRIC POWER COMPANY, and
WEST TEXAS UTILITIES COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ARKANSAS ELECTRIC COOPERATIVE CORP., et al.,
Intervenors.

and consolidated case No. 76-2012

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenors Dallas Power and Light Company, et al, and of the memorandum filed by intervenor Houston Lighting and Power Company in support of the petition for rehearing and/or suggestion for rehearing *en banc*, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that intervenors' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

George A. Fisher
Clerk

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Central Power & Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company } Docket No. E-9558

ORDER REJECTING IN PART AND ACCEPTING IN PART APPLICATION FOR ACTION PURSUANT TO SECTION 202

(Issued July 21, 1976)

On May 4, 1976, Central Power & Light Company (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO), and West Texas Utilities Company (WTU), (Applicants) filed a petition and application with this Commission stated to be pursuant to Sections 202(a) and 202(b) of the Federal Power Act. On May 5, 1976, the Lower Colorado River Authority, (LCRA), a political subdivision of the State of Texas, requested an order of the Commission requiring Applicants to remain connected with Houston Power and Light (HP&L) [sic] Texas Electric Service Company (TESCO), Dallas Power and Light (DP&L) and Texas Power and Light Company (TP&L). On May 13, 1976, Applicants filed a motion application to

> ". . . require the emergency reconnection of electric facilities described below, pursuant to Section 202(c) of the Federal Power Act."

Applicants state that on May 4, 1976 as a result of a determination that a portion of PSO's load at Davidson, Frederick and Tipton, Oklahoma could be served more economically from the southern part of WTU's system by a 69 kv line from WTU's Vernon Substation, WTU began transmitting and selling electricity for resale to PSO. As a result, Applicants state,

> "the interconnections between the electrical facilities of PSO and WTU resulted in the transmission of electric energy at wholesale in interstate commerce by all the members of ERCOT and SWPP. Because HL&P, DP&L, TESCO and TP&L each own and operate facilities for such transmission and sale of electric energy, and because none is otherwise exempt from the jurisdiction of the Federal Power Commission, each, like the Applicants, is a public utility within the meaning of the Federal Power Act." (See page 4 of Petition and Application).

Based upon such facts as alleged by the Applicants, and citing Section 202(a) of the Federal Power Act, Applicants have requested that the Federal Power Commission:

(1) Conduct such investigations and issue such orders as are necessary and proper under Section 202(a) of the Federal Power Act, to promote and encourage continued and expanded interconnection of facilities for the generation, transmission and sale of energy between members of SWPP and ERCOT;

(2) Issue such orders under Section 202(b) of the Federal Power Act, as may be necessary to continue and maintain the existing interconnections between Petitioners and members of ERCOT; and

(3) Conduct such investigations and issue such orders under Section 202(b) of the Federal Power Act, as are necessary to establish additional interconnections between members of ERCOT and members of SWPP.

After transmission of electric energy in interstate commerce by TWU on May 4, 1976, this Commission was notified by HL&P and TESCO that they had severed all previous interconnections with WTU and CP&L in order that they retain within Texas the physical operation of transmitting and selling electric energy generated within the State of Texas.

On May 5, 1976, the General Manager of LCRA, filed a protest with the Federal Power Commission stating that LCRA was interconnected with WTU and CP&L, and that the severing of interconnections by TESCO, DP&L, TP&L, and HL&P "* * * may well jeopardize the reliability of service of the Lower Colorado Power Authority [sic] * * *".

On May 13, 1976, CP&L, and WTU filed "Motion for Emergency Interconnection Pursuant to Section 202(c) of the Federal Power Act". WTU and CP&L agree in their Motion that HL&P has opened its long standing interconnections with CP&L and also its interconnections with LCRA and TP&L. On or about May 4-5, 1976, TESCO, DP&L and TP&L opened all of their interconnections except those existing among themseves. In addition, TESCO has opened its long standing interconnections with WTU. Applicants further state, in their May 13, 1976 Motion that the interconnections opened by HL&P, TESCO and TP&L have been in operation for many years and are a factor in the amount of capacity installed in Texas to meet the loads imposed on all parties described in the Motion. According to that Motion these interconnections were designed to provide a sufficient reserve margin of electric generation capacity to ensure the reliable flow of electric energy to the customers of all the parties; the systems of the various parties, were alleged to have been, designed and operated to rely on the continued inter-

connections among them all; and to the extent such interconnections are interrupted, reliability is allegedly impaired and the public interest not be served by the unilateral realignment imposed by HL&P and TESCO on May 4, 1976, or any other realignment which excludes WTU and CP&L. For these reasons the Applicants request that the Commission enter an order under Section 202(c) of the Federal Power Act, to require immediate resumption and continuation of all the interconnected service among all of the parties as it was on May 3, 1976. In addition, Applicants propose that the compensation among the systems for the services thereby provided would be at the rates and charges in effect prior to May 4, 1976.

On May 14, 1976 HP&L filed, "Response of Houston Lighting and Power Company to Motion of Central Power and Light Company and West Texas Utilities Company for Emergency Interconnection Pursuant to Section 202(c) of the Federal Power Act." The Response states in part (p. 1):

> HL&P hereby objects to this motion and submits that the Commission should not order the actions requested therein without first convening a hearing in order to determine whether an emergency exists within the meaning of the Act and the Commission's regulations thereunder. Furthermore, regardless of what action may be taken by the Commission, it should deny the claim made by Movants that HL&P and the other named TIS member companies be denied their statutory right to proceed under Section 202(d) should the Commission determine that an emergency exists.

In addition, on May 17, 1976 the "Reply of Dallas Power and Light Company to Motion of Central Power and Light Company and West Utilities Company [sic] for Emer-

gency Interconection Pursuant to Section 202(c) of the Federal Power Act," was filed. That Reply states in part (pp. 2, 6):

> The simple facts are, however, that the emergency, if any, which is now claimed by CP&L and WTU is of their own creation and is based on wholly ulterior motives. By now this Commission is fully aware of the pre-dawn escapade of WTU on Tuesday, May 4, 1976, when it voluntarily commenced electric service to three small communities in Oklahoma from its previously Texas intrastate generating facilities in violation of its contract with Texas Electric Service Company (TESCO), fully cognizant that such action would provoke a disconnection by TESCO of its several ties with WTU and of the several ties with certain other members of the Texas Interconnection System. (pg. 2).
>
> No attempt, however, has been made to establish the existence of any of the basic criteria prerequisite to the invocation of emergency action under Section 202(c) of the Act and Section 32.61(e) of the Regulations. There is no showing:
>
> (a) Of the problem situation;
>
> (b) Of the resource limitations which require electric power and/or emergency transfers;
>
> (c) That without additional power and energy transfers the applicants will be unable to maintain electric utility service required in public interest;
>
> (d) Of the firm amounts of electric power and energy received from and delivered to other systems;
>
> (e) That despite "*diligent best efforts*" additional power and energy cannot be purchased; or
>
> (f) Of what steps have been taken to secure voluntary interconnections and emergency transfers.

On May 18, 1976, DP&L, TESCO, and TP&L filed a petition to intervene. On May 19, 1976, LCRA also filed a petition to intervene. And on May 25, 1976, the City of San Antonio through its City Public Service Board (CPSB); and the Cities of Altus, Frederick, Cordell, Mannford; Verdigree Valley Electric Coop, Inc.; Indian Electric Coop, Inc., the Municipal Electric System of Oklahoma (Cities) petitioned to intervene on June 25, 1976, Arkansas Electric Cooperative Corporation petitioned to intervene.

On May 19, 1976, LCRA filed "Response of Lower Colorado River Authority To Motion Of Central Power and Light Company and Texas Utilities Company For Emergency Interconnection". LCRA's filing states in part:

> Since May 4, 1976, the major electric generating utilities in Texas have been operating in two separate groups. Houston Lighting and Power Company, the operating subsidiaries of Texas Utilities and the Texas Municipal Power Pool, with an aggregate of approximately 75% of the generating capacity in the state, are interconnected among themselves, and West Texas Utilities, Central Power and Light Company, the City of Austin, City Public Service Board of San Antonio, and LCRA are interconnected.
>
> Since the date the Texas Interconnected System became bifurcated the group of which LCRA is a part has already experienced an episode of severely fluctuating frequency caused by the sudden loss of a moderate amount of generating capacity. As the heat of the summer and its attendant peak load conditions approach, such disturbances can only be exacerbated to the point, in LCRA's judgment, of forced load shedding on the part of one or more of the utilities with which it is interconnected. Under the circumstances, the present situation constitutes an emergency within the meaning of the Federal Power Act. [Section 202(d)]. An order of the Federal Power Commission to allow the systems

> previously members of TIS to restore temporarily the connections which were disconnected on May 4, 1976, is necessary and appropriate to meet this emergency.

On May 21, 1976, *CP&L* and *WTU* filed a Response to the **Replys [sic] of DP&L, *et al.*,** HP&L [sic] and LCRA. The Response reasserts the previously stated position of CP&L and WTU.

On June 21, 1976, CP&L, WTU *et al.* filed a Motion with the Commission requesting an order initiating and scheduling hearings on their previously filed application of May 4, 1976 and their Motion of May 13, 1976. On June 30, 1976 DP&L, TESCO and TP&L responded requesting denial of the Motion and on July 6, 1976 HP&L responded also requesting denial of the Motion.

CP&L, WTU *et al.*, on July 6, 1976 filed an additional motion asserting in part:

> Currently there are substantial controversies both of fact and of law as to whether an emergency affecting the electric utilities in Texas in fact exists. If such an emergency may be said to exist, there is significant disagreement as to its nature and expected duration. Hence it is crucial to the public interest that any order entered by the Commission and responsive to an emergency, however defined, be based upon an adequate record.

In addition the Motion of June 6, 1976 states:

> Applicants contend that, by reason of the legal responsibilities of Texas Electric Service Company and Houston Lighting and Power Company to interconnect with West Texas Utilities Company and Central Power and Light Company and the fact that Central Power and Light Company and West Texas Utilities Company are engaged in the transmission of electric energy in interstate commerce, and otherwise, Texas Electric Service Company and Houston Lighting and Power Company are subject to the jurisdiction of the Commission.

Based on the above allegations the motion of CP&L, WTU, *et al.*, requests:

> . . . that the Commission conduct hearings prior to issuing any order under Section 202(c) or 202(d) or to issuing any order purporting to decide the question of the jurisdiction of the Commission over the Texas Utilities subsidiaries or Houston Lighting and Power Company.

We find that based upon the pleadings filed by all of the parties to this proceeding, the facts surrounding the events of May 4, 1976, are uncontested. Therefore, pursuant to Section 201 of the Federal Power Act, 16 USC 824, the Commission finds Central Power & Light Company and West Texas Utilities Company to be "public utilities" within the meaning of the Act and, therefore subject to the jurisdiction of this Commission. The Commission on June 30, 1976 requested its General Counsel to address the "public utility" jurisdictional status as it relates to HL&P, TP&L, DP&L, and TESCO. By memorandum dated July 1, 1976,[1] the General Counsel concluded, ". . . the four systems are, and have been . . . Texas intrastate systems, not "public utilities". The Commission adopts its General Counsel's conclusion and therefore dismisses Applicant's request for relief pursuant to Section 202(b) of the Federal Power Act on the basis of no jurisdiction.

Based upon the representations of LCRA and other of the participants in this matter it does not appear that a physical operating condition now exists within the State of Texas which would warrant this Commission taking action under Section 202(c) of the Federal Power Act.

However, we are ordering the Staff to commence a Section 202(a) study to update and amend as necessary the 1972 staff report entitled "Study of Proposed Interconnection Between Electric Reliability Council of Texas and Southwest Power Pool."

[1] Appendix I to this order.

An examination of the pleadings filed in this proceeding has led us to conclude that conditions do warrant action under Section 202(d) to forestall probable operating difficulties pending resolution of this proceeding, and that an "emergency" within the meaning of Section 202(d) of the Act now exists. No major transmission system outage within the ERCOT system from the time WTU began service to the three Oklahoma cities on May 4, 1976, through the date of this order has occurred. However, the "emergency" contemplated by Section 202(d) does not require the *fait accompli* of an actual outage of service or even such preliminary indications of system instability as frequency excursions and/or voltage reductions. Such an interpretation would place this Commission in the untenable position of only being able to act when an outage occurs, even though the possibility of the occurrence of such an emergency may be predictable, and discernable by the exercise of the Commission's expertise, as in the instant case.

We find that the public interest here clearly requires that action under Section 202(d) be taken by the Commission because the facts indicate that there is a reasonable probability of a major outage which may be averted through reestablishment of the interconnections due to one or more problems arising from (1) generating facilities, (2) primary and secondary bulk transmission facilities, or (3) other unforeseen causes including fuel shortages.[2]

[2] The Texas Company, Docket No. E-6115 7 FPC 364; Gulf Oil Corp., Docket No. IT-6055, 6 FPC 685; Kansas Power & Light Co. and Kansas Gas and Electric Co., Docket Nos. E-6116 and E-6110, 7 FPC 452; Central Maine Power Company, Docket No. F-6247, 8 FPC 1248; Kansas Power & Light Co., Docket Nos. E-6568 and E-6749 19 FPC 39; The Kansas Power & Light Co., Docket No. E-6568, 13 FPC 1315 Homestake Mining Co. Docket No. IT-6093, 6 FPC 1076 [sic].

Furthermore, we do not find that the definition of "emergency" concerning Section 202(d) found in Section 32.20 of our Rules and Regulations confine our finding of an "emergency" to the actual failure of facilities as stated in that section. We will in the future as we have in the past apply Section 32.20 to include conditions which show reasonable probability in our determination of emergency conditions under Section 202(d) of the Act.

An additional concern to this Commission are those utilities which are dependent to a significant extent on gas supplied by Lo-Vaca Gathering Company and/or Coastal States Gas Producing Company, subsidiaries of Coastal States Gas Corporation.[3]

The bifurcation of the Texas Interconnected System has resulted in the greater sensitivity of frequency change for a given loss of generation and the increased operating cost resulting from carrying a higher spinning reserve level than that required when the ERCOT system is totally interconnected. The loss of load probability has been increased due to the loss of capacity availability on a common basis. As a result, the capability of the power systems to respond to a single event or a sequence of events such as

[3] At the present time, CP&L depends on gas supplied by Coastal States and/or Lo-Vaca for about 53% of their fuel supply. The Cities of Austin and Brownsville, CPSB, LCRA, South Texas Electric Cooperative, and Medina Electric Cooperative are virtually 100% dependent. (FPC Form 423, 1975) TP&L, DP&L and TESCO may also face gas supply difficulties in the event of a Lo-Vaca bankruptcy. A portion of the gas which these companies purchase from their wholly-owned subsidiaries, Texas Utilities Fuel Company and Old Ocean Fuel Company is transported through the Lo-Vaca system. Furthermore, their principal outside fuel supplier, Lone Star Gas Company, Division of Enserch Corporation is dependent on Lo-Vaca for about 20% of its system requirements. Cf. Homestake Mining Co., Docket No. IT-6093, 6 FPC 1076.

loss of the largest plant, loss of the largest transmission line, etc., is reduced. Moreover, voltage levels are highly likely to be affected adversely in this mode of operation. We find that it is in the public interest to take action to ensure maximum system reliability when remedies are available to this Commission.

Section 32.20 (18 CFR 32.20 et seq.) contemplates power and energy transfers without jurisdictional consequences flowing therefrom, when connections are authorized. Conditions as contemplated by Section 202(d) cover factual situations of the type here before the Commission. The May 5, 1976, request of LCRA and their Response of May 19, 1976, to the Motion of WTU and CP&L, falls within the scope of that section and the Commission will treat it as such. Based upon those filings and other information available within the files of the Commission, the conditioned disconnection of the foregoing systems creates conditions which are unforeseen occurrences and not within the power of LCRA to prevent and which may render it unable to provide service to its customers. The Commission is, therefore, authorizing pursuant to Section 202(d) of the Federal Power Act all of the affected systems to temporarily reestablish their previously operational interconnections, pending further Commission order in this matter.

The Commission finds:

(1) Intervention by the Lower Colorado River Authority, Houston Lighting & Power Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company, City Public Service Board of San Antonio, and Cities of Altus, Frederick, Cordell, Mannford, Oklahoma (Cities); Verdigree Valley Electric Coop, Inc.; Indian Electric Cooperative, Inc.; the Municipal Electric

Systems of Oklahoma and the Arkansas Electric Cooperative Corporation in this proceeding are in the public interest.

The Commission orders:

(1) Central Power & Light Company and West Texas Utilities Company are "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [sic]) and therefore subject to the jurisdiction of this Commission.

(2) Houston Power & Light Company, Dallas Power and Light Company, Texas Power and Light Company and Texas Electric Service Company are not "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [sic]) and therefore are not subject to the jurisdiction of this Commission.

(3) The Motions of CP&L, WTU *et al.* filed on June 21, 1976, and July 6, 1976, are hereby denied.

(4) The Commission hereby authorizes HL&P, TESCO, DP&L, and TP&L to maintain as temporary connections within the meaning of Section 202(d) of the Federal Power Act all physical interconnections which those systems maintained and operated prior to May 4, 1976, with the systems of CP&L, WTU, LCRA, City of Austin and City Public Service Board of San Antonio.

(5) The authorization of the temporary connections as referred to in paragraph (3) [sic] shall continue until further Commission order. During the period that these temporary interconnections are utilized, HL&P, TESCO, DP&L, and TP&L shall not be determined to be "public utilities" under the Federal Power Act by reason of operations under the interconnections.

(6) The Application of May 4, 1976 and the May 13, 1976 "Motion of Central Power and Light Company and West Texas Utilities Company for permanent and Emergency Interconnection Pursuant to Section 202(b) and (c) of the Federal Power Act" are dismissed.

(7) The Commission hereby orders the Staff of the Federal Power Commission to commence a Section 202(a) study to update and amend as necessary the 1972 staff report entitled "Study of Proposed Interconnection Between Electric Reliability Council of Texas and Southwest Power Pool."

(8) Lower Colorado River Authority; Dallas Power and Light Company; Texas Electric Service Company; Texas Power and Light Company; City Public Service Board of San Antonio; Cities of Altus, Frederick, Cordell, Mannford, Oklahoma (Cities); Verdigree Valley Electric Coop., Inc.; Indian Electric Cooperative, Inc.; the Municipal Electric Systems of Oklahoma and the Arkansas Electric Cooperative Corporation are hereby permitted to intervene in these proceedings subject to the rules and regulations of the Commission; *Provided, however,* that participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions to intervene; and Provided, further, that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any orders of the Commission entered in this proceeding.

(9) The Secretary is hereby directed to cause this order to be published in the Federal Register and in addition, is hereby directed by mail to provide a copy of this order to all members of the Electric Reliability Council of Texas

(ERCOT) and to all members of the Southwest Power Pool (SWPP).

By the Commission. Commissioner Watt, concurring in part and dissenting in part, filed a separate statement appended hereto.

(S E A L)

Kenneth F. Plumb,
Secretary.

Docket No. E-9558

APPENDIX I

July 1, 1976

MEMORANDUM TO: The Commission

FROM: General Counsel

SUBJECT: Jurisdictional Status

Pursuant to your request at yesterday's Commission meeting, I have reviewed the question of "public utility" jurisdictional status as it relates to the operation of Dallas Power & Light Company, Houston Power & Light Company [sic], Texas Electric Service Company, and Texas Power & Light Company.

As defined in the Federal Power Act, a "public utility" means any person who owns or operates facilities subject to the Part II jurisdiction of the Commission, § 201(e). Facilities of that type are facilities for the transmission or sale at wholesale for resale of electric energy generated in one state and consumed in another, but not facilities for generation, facilities used in local distribution, facilities for the transmission of electric energy in intrastate commerce or facilities for the transmission of electric energy consumed wholly by the transmitter, § 201(b) (c). My conclusions are fourfold:

> Prior to May 4, 1976, the aforementioned four systems were operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were not susceptible to classification as "public utilities";
>
> During May 4, 1976, from 5:30 a.m. to 3:43 p.m., the aforementioned four systems operated in parallel — or electrical synchronizism [sic] — with other electric

utilities which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were susceptible to review by the Commission as to their "public utility" status;

Subsequent to May 4, 3:43 p.m., the aforementioned four systems have been operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they are not susceptible to classification as "public utilities"; and

During the 10-hour period of synchronous electrical operation on May 4, the facilities and operations of the aforementioned systems were, for all practical purposes, those for the transmission of electric energy in intrastate commerce,* and such systems fall within the Commission's rule of determining "public utility" status based upon the overall characteristics of the electric system's operations, notwithstanding some interstate transmission of electric energy. See attached letter of the Commission dated May 28, 1965, *Home Light and Power Company.*

"Public utility" status** under the Federal Power Act is determined by an engineering and scientific factual showing, resting upon substantial evidence, that an electric system's facilities are used for the transmission or sale of energy generated in one state and consumed in another. *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 463 (1972). Most recent Commission cases as referred to by the

* And/or facilities for generation, for local distribution, or facilities for the transmission of electric energy consumed wholly by the transmitter.

** A company may make no jurisdictional sales and still be found to be a "public utility." In such instances, the company would not have wholesale rate schedules on file under §§ 205 and 206, but such company could be a "public utility" subject to regulation under the other sections of Parts II and III applicable to public utilities, (e.g., §§ 202(b), 203, 204, 301, and 305 of the Power Act).

Supreme Court in that case have reviewed the nature of an electric system's operations and have applied to the transmission networks, an electromagnetic unity of response/commingling theory to comprise the necessary showing for public utility status. For purposes of this memorandum, I have assumed and equated synchronous electrical operation with electromagnetic unity of response and commingling. I have further assumed the overall intrastate character of the aforementioned four Texas systems which Justice Douglas recognized in his dissent to the Court's opinion in *Florida Power & Light Co.*, 404 U.S. 474.

Applying the Commission's *Home* ruling, I conclude that the four systems are, and have been throughout the three time periods, Texas intrastate systems, not "public utilities." The legal authority for the Commission to apply, the *Home* ruling, rests upon the Supreme Court's holding in *Connecticut Light and Power* v. *FPC*, 324 U.S. 515, 536 (1945):

> * * * Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. [***]

/s/ DREXEL D. JOURNEY

Drexel D. Journey

*** How the Commission will exercise such discretion depends upon the particular facts before it; i.e., largely those concerned with patterns of physical operation of the utilities and the purposes which FPC controls would serve in light of Federal/state regulatory interests. See *City of Colton*, 26 FPC 223, 236 (1961), affirmed *sub nom, FPC v. Southern Cal Edison*, 376 U.S. 205 (1964); and *Florida Power & Light Co.*, 37 FPC 544, 552 (1967).

3. Furthermore, it is difficult for TUS to determine whether CP&L and WTU are even claiming an emergency, as that term is defined in the rules and regulations of this Commission, in light of their wholly inconsistent positions expressed this past week to the United States District Court for the Northern District of Texas (District Court) and to the Public Utilities Commission of Texas (PUC). We believe that the underlying motives of CP&L and WTU are crystal clear when their latest action is viewed in context with the chronology of events of the recent past. These events should be considered by this Commission in evaluating the action to be taken on the Motion now pending before it.

1975 — Following complaints that CSW is not an integrated public utility system within the meaning of Section 11 of the 1935 Act, CSW proposes the pervasive integration of the Texas Interconnected System (TIS), including the TUS companies and Houston Lighting & Power Company (HLP), with the Southwest Power Pool (SWPP).

1975 — TUS rejects the CSW proposal.

January 5, 1976 — CSW serves its Supplemental Memorandum filed with the Securities and Exchange Commission (SEC) proposing the same pervasive integration of TIS and SWPP, and at page 8, threatens that "in the event that their (TUS and HLP) cooperation is not forthcoming on a voluntary basis, other options for securing necessary cooperation will be considered."

January 30, 1976 — CSW's status as a single integrated electric holding company within the meaning of Section 11 of the 1935 Act questioned by the SEC in Admin. Proc. File No. 3-4951.

May 3, 1976 (4:50 p.m.) — CP&L and WTU file suit in the United States District Court seeking, among other things, an order to prevent TESCO from disconnecting from WTU, alleging that they are certain that when TESCO becomes aware of any institution of interstate service by WTU it will disconnect its ties with WTU.

May 4, 1976 (5:30 a.m.) — WTU breaches its long-standing contract with TESCO by instituting service to Oklahoma from its previously intrastate generating facilities.

May 4, 1976 (Approx. 9:00 a.m.) — CSW files a petition with the Federal Power Commission seeking, among other things, a determination that as a result of the short period of time when TESCO was involuntarily interconnected with WTU while it was selling power to Oklahoma, TESCO became a public utility within the meaning of Section 201 of the Act.

May 4, 1976 (11:00 a.m.) — TUS is made aware of the interstate tie and disconnects from WTU at 3:43 p.m.

May 4 1976 (5:00 p.m.) — CP&L and WTU seek and are refused a temporary restraining order by the District Court prohibiting TESCO from disconnecting or, in the alternative, requiring it to reconnect with WTU, on the basis that irreparable injury and harm would result to CP&L and WTU if TESCO were permitted to disconnect or not ordered to reconnect its facilities with those of WTU.

May 4 1976 (5:30 p.m.) — After being denied the temporary restraining order, CP&L and WTU ask the District Court to enter an order requiring them to cease interstate service to Oklahoma.

May 4, 1976 (5:40 p.m.) — After the District Court refuses the request by CP&L and WTU to order them to cease interstate service to Oklahoma, CP&L and WTU offer to discontinue interstate service if TESCO will reconnect, under a written agreement, with WTU.

May 4, 1976 (5:40 p.m.) — TESCO accepts the proposal and agrees to reconnect its ties with WTU.

May 5, 1976 (11:00 a.m.) — CP&L and WTU, by telephone, state they have changed their minds and withdraw their offer to discontinue interstate service to Oklahoma.

May 6, 1976 — WTU and CP&L submit an order to the District Court denying their motion for a temporary restraining order indicating in their transmittal letter that "The Plaintiffs have decided not to voluntarily disconnect their service into Oklahoma so that the Defendants will voluntarily reestablish automatic connections with the Plaintiffs. It is also the Plaintiffs' belief that rights already exist which will provide for the resumption of service in the event of an emergency, and that a written agreement with the Defendants in this regard is not required."

May 7, 1976 — CP&L and WTU testify under oath in a hearing called by the PUC that no emergency exists and that they have no need for interconnection with TUC or HLP.

May 7, 1976 — The PUC finds that no present emergency exists on any electric system operating in Texas, including CP&L and WTU, and orders all electric generating companies in Texas, including CP&L and WTU to report to it on May 21, 1976 which system — an intra-state . . . [SIC]

Docket No. E-9558

FEDERAL POWER COMMISSION

Washington, D. C. 20426

May 28, 1965

Home Light & Power Company
810 Ninth Street
Greeley, Colorado

Attention: Warren A. Terry, President

Dear Sirs:

The Commission has reviewed the available information regarding the operations of Home Light & Power Company in the light of Mr. Terry's testimony on S. 218 before the United States Senate Commerce Committee on Thursday, May 13, 1965. Without making any definitive determination of the questions raised by Home's contention that it is not a "public utility" within the meaning of the Federal Power Act, but without prejudice to any claim of Home to complete exception, it is apparent that Home's facilities and operations are for most practical purposes those of a local distribution company. In these circumstances the Commission sees no present necessity for exercising such jurisdiction as it may have to require Home's compliance with the Commission's accounting regulations.

Accordingly, you are advised that Home is not being required to take any present action which might be necessary to bring its books of account into compliance with the Commission's Uniform System of Accounts and is excused from the requirement thereof for the filing of reclassification and original cost studies of electric plant. Home will, of course,

continue to be required to file the informational reports provided for in accordance with the provisions of section 311 of the Federal Power Act which expressly applies to all electric utilities whether or not they fall within the Acts' [SIC] definition of "public utilities".

By direction of the Commission.

J. H. Gutride
Secretary

Central Power & Light Company,
Public Service Company of Oklahoma,
Southwestern Electric Power Company, and
West Texas Utilities Company
} Docket No. E-9558

(Issued July 21, 1976)

WATT, Commissioner, *concurring in part and dissenting in part*:

For the most part, I agree with today's decision. I emphatically agree that Houston Power and Light Company, [SIC] Dallas Power and Light Company, Texas Power and Light Company and Texas Electric Service Company are not subject to FPC jurisdiction. The Commission should not condone such blatant attempts as has occurred here to force jurisdiction upon otherwise non-jurisdictional companies.

I must, however, dissent to the Commission's finding that an emergency exists within the meaning of Section 202(d) of the Federal Power Act. Based on the statements of the Public Utility Commission of Texas and the FPC Bureau of Power, I simply cannot reach a conclusion that an emergency exists. For reasons which I do not understand, the majority insists on creating by definition an emergency. An emergency which cannot be defined or terminated by events other than FPC administrative action.

Today's decision stands for the proposition that the FPC can allow electricity to flow between jurisdictional and non-jurisdictional companies on a day-to-day basis in anticipation of a future emergency. I am not aware of any case which is similar to this and do not believe it wise

to break such "new ground" given the facts which are before us. Earlier cases dealt with by the FPC allowed permanent facilities to be built for anticipated emergencies but required that the ties remain open until the real emergency came into being.

Today's action allows the creation by definition of an emergency to allow the interconnection of interstate and intrastate systems without bringing about federal jurisdiction. I like the result but not the legal fiction created to get there.

I share my fellow Commissioners' concern for the maintenance of reliable service within the ERCOT group. I also agree it is the Commission's purpose to assure as far as is reasonably practicable against any devastating effects which could follow any such emergency.

The filing of appropriate applications and the issuance of orders by this Commission after the onset of any such emergency could result in an intolerably long (even if only several hours) disruption in service. To permit the previously intrastate, interconnected companies to respond without delay to any such emergency, I would declare our intention not to assert jurisdiction over those companies which respond to such an emergency, pending the filing of and ruling upon appropriate pleadings under Section 202(d). If based upon the facts adduced the Commission then were unable to determine a bona fide emergency situation exists I would allow those companies which responded in good faith to what appeared to be an emergency situation to return to totally intrastate operations by the reopening of the various ties with the interstate parties. If, on the other hand, the Commission were to find an emergency to exist, it could permit operation under Section

202(d) for the duration of such emergency period with full assurance that otherwise intrastate utilities will not lose their status as companies not subject to the jurisdiction of the Federal Power Commission.

Under such a plan, the Commission would not be forced to strain the traditional definition of an emergency and could adequately protect the public.

/s/ JAMES G. WATT
Commissioner

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;
John H. Hollomon III, and
James G. Watt.

Central Power & Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company	Docket No. E-9558

ORDER DENYING REHEARINGS

(Issued September 17, 1976)

On July 21, 1976, the Federal Power Commission in the above-titled docket issued its "Order Rejecting In Part And Accepting In Part Application For Action Pursuant To Section 202." The Commission in its order issued July 21, 1976, ordered *inter alia:*

> (1) Central Power & Light Company and West Texas Utilities Company are "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [SIC]) and therefore subject to the jurisdiction of this Commission.
>
> (2) Houston Power & Light Company [SIC], Dallas Power and Light Company, Texas Power and Light Company and Texas Electric Service Company are not "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [SIC]) and therefore are not subject to the jurisdiction of this Commission.
>
> (4) The Commission hereby authorizes H&LP [SIC], TESCO, DP&L, and TP&L to maintain as temporary connections within the meaning of Section 202(d) of the Federal Power Act all physical interconnections

which those systems maintained and operated prior to May 4, 1976, with the systems of CP&L, WTU, LCRA, City of Austin and City Public Service Board of San Antonio.

(5) The authorization of the temporary connections as referred to in paragraph (3) [SIC] shall continue until further Commission order. During the period that these temporary interconnections are utilized, HL&P, TESCO, DP&L, and TP&L shall not be determined to be "public utilities["] under the Federal Power Act by reason of operations under the interconnections.

(7) The Commission hereby orders the Staff of the Federal Power Commission to commence a Section 202(a) study to update and amend as necessary the 1972 staff report entitled "Study of Proposed Interconnection Between Electric Reliability Council of Texas and Southwest Power Pool."

On August 20, 1976, applications for rehearing of the Commission's July 21, 1976, order were filed by the following intervenors (1) Arkansas Electric Cooperative Cooperation, (2) the Cities of Altus, Frederick, Cordell, Mannford, and Verdigree Valley Electric Cooperative, Inc. and Indiana Electric Co-op, Inc. and the Municipal Electric Systems of Oklahoma (Cities - Co-ops) and (3) Central Power & Light Company (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO) and West Texas Utilities Company (WTU) (collectively, Applicants).

Arkansas Cooperative alleges in its August 20, 1976, Application for Rehearing that if it is to experience satisfactory reliability of service, the Southwest Power Pool must be interconnected with the Texas Utilities. In addition, the Cooperative urges that the Commission make a complete and thorough investigation of the matter in which Dennison Dam, a Federal project operated by the Corp [sic] of Engi-

neers and the power marketed by Southwest Power Administration (SPA), is being operated to determine whether the best and most productive use is being made of the interstate water supply from the Red River. The Cooperative further requests, "that the Commission hold the necessary hearings and make a thorough investigation of the consequences of the Texas Companies' stubborn refusal to make the interconnections required to insure reliability and achieve obvious economies."

On August 20, 1976, the Cities - Co-ops filed a Petition for Rehearing of the Commission's July 21, 1976, order in the above-entitled docket. The Cities - Co-ops allege *inter alia*, that the Commission erred in determining that HP&L [sic], DP&L, TP&L and TESCO were not public utilities pursuant to Section 201 of the Power Act. The Cities-Co-ops further allege that it was an error for the Commission to deny the May 13, 1976, Motion of CP&L and WTU for permanent and emergency interconnection pursuant to Sections 202(b) and (c) of the Federal Power Act. Based upon its Petition for Rehearing the Cities - Co-ops request this Commission to institute hearings and to modify its July 21, 1976, order consistent with the arguments presented in its petition.

Applicants, on August 20, 1976, filed an Application for Rehearing of the Commission's July 21, 1976, order in the above-entitled docket. In general, the Applicants Petition for Rehearing alleges that the Commission abused its discretion in failing to conduct hearings in this matter; that the Commission erred in failing to consider the anti-competitive effects of its order, and that the material relied upon was inadequate to support the conclusion that the Texas Companies were not public utilities. Based upon the allegations set forth in their Petition for Rehearing Applicants request that the Commission set this matter for

hearing with respect to the relief requested under Sections 202(a) (b) and (c) of the Federal Power Act.

The Commission finds:

The Applications for Rehearing filed on August 20, 1976, by (1) Arkansas Electric Cooperative Cooperation [sic], (2) the Cities of Altus, Frederick, Cordell, Mannford, and Verdigree Valley Electric Cooperative, Inc. and Indiana Electric Cooperative, Inc. and the Municipal Electric Systems of Oklahoma and (3) Central Power & Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company, present no facts or legal principles which would warrant any change in or modification of the Commission's order issued July 21, 1976, in this docket.

The Commission orders:

The Petitions for Rehearing of the Commission's July 21, 1976, order in this docket are hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX E

PART II — REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Declaration of Policy; Application of Part; Definitions

Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric

energy consumed wholly by the transmitter. [49 Stat. 847-848; 16 U.S.C. 824(b)]

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(f)]

Interconnection and Coordination of Facilities; Emergencies; Transmission to Foreign Countries

Sec. 202. [*As amended August 7, 1953.*] (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts

for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment, will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations. [49 Stat. 848; 16 U.S.C. 824a(a)]

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would

impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. [49 Stat. 848-849; 16 U.S.C. 824a (b)]

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party. [49 Stat. 849; 16 U.S.C. 824a (c)]

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary

facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided,* That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further,* That upon approval of the Commission permanent connections for emergency use only may be made hereunder. [49 Stat. 849; 16 U.S.C. 824a (d)]

(e) After six months from the date on which this Part takes effect, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate. [49 Stat. 849; 16 U.S.C. 824a (e)]

(f) The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a

foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this part. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection 202(e). [67 Stat. 461; 16 U.S.C. 824a(f)]

Appendix F

DOCKET NO. 14

RE: THE APPLICATION OF HOUSTON LIGHTING AND POWER COMPANY, ET AL, RECONNECTION OF THE TEXAS INTERCONNECT SYSTEM	THE PUBLIC UTILITY COMMISSION OF TEXAS

Amended Final Order

After hearing and considering all motions for rehearing on July 11, 1977, the Commission hereby amends its final order to be and read as follows:

Houston Lighting & Power Company, herein referred to as HL&P, Texas Power & Light Company, herein referred to as TP&L, Dallas Power and Light Company, herein referred to as DP&L, and Texas Electric Service Company, herein referred to as TESCO, filed with The Public Utility Commission of Texas on January 7, 1977, complaints against West Texas Utilities Company, herein referred to as WTU, and Central Power and Light Company, herein referred to as CP&L, alleging that they had breached their contract with other members of the Texas Interconnect System, hereinafter referred to as TIS, causing a disruption of such system resulting in loss of economical, reliable, and safe electrical service to the rate payers of such interconnected systems, and praying for reconnection of such system as it existed on May 3, 1976.

That subsequently the following parties answered or intervened to become parties to the proceedings in said docket:

1. Central Power and Light Company
2. West Texas Utilities Company
3. Lower Colorado River Authority, herein referred to as LCRA
4. The City of Austin, Texas
5. City Public Service Board of City of San Antonio, herein referred to as CPSB
6. South Texas Electric Cooperative, Inc.
7. Brazos Electric Power Cooperative, Inc.
8. Medina Electric Cooperative, Inc.
9. Western Farmers Electric Cooperative
10. Southwest Texas Electric Cooperative, Inc.
11. Concho Valley Electric Cooperative, Inc.
12. Texas Municipal Power Agency

Based upon the pleadings and evidence submitted during the several public hearings in said docket and in the final hearing of said docket, Federal Power Commission Order in Docket No. E-9583, and Docket No. E-9558, which in compliance with Council's [sic] request during the course of such proceedings and without objections raised during such hearing the Commission takes official notice of, the Commission makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the TIS had developed over a long period of time, some of such interconnections going back as far as 1924.
2. That as the interconnections increased, the transmission and generating facilities of TIS were de-

veloped to operate in synchronism, so that the loss of any unit on the system automatically caused the other units to increase output to pick up the lost load.

3. That as of May 3, 1976, there were 282 generating units in the TIS synchronous operation.
4. That the TIS prior to May 3, 1976, utilized central planning for operational controls to insure reliability, and stability of the system.
5. That the TIS was not designed to operate in synchronism with the Southwest Power Pool or any other large system.
6. That the TIS cannot operate in synchronism with the Southwest Power Pool or any other large system without the expenditure of large sums of money for new and improved transmission lines.
7. That the costs for adequate transmission lines for the TIS to operate in synchronism with the Southwest Power Pool could equal or exceed one billion dollars.
8. That interconnection with the Southwest Power Pool would not increase the reliability of TIS, but would increase the time required for stablization of the system in case of the loss of load on one of the systems.
9. That the costs for proper interconnections between the TIS and the Southwest Power Pool exceeds the benefits to the rate payers on the Texas Interconnect System.
10. That the rate payers of the TIS can ill afford to carry the extra burden of interconnection with the Southwest Power Pool in addition to the cost of converting the generating facilities of such system so as to use more abundant fuels.
11. That each of the members of the TIS in order to protect themselves against the cost and loss of

stability of interconnection with the Southwestern Power Pool or other large systems had conditioned such interconnection on intrastate operation of each of the interconnected companies through individual contracts or through the terms and conditions of membership in the Electric Reliability Council of Texas, hereinafter referred to as ERCOT.

12. That such condition was contractual and if not covered by individual contracts was part of the terms and conditions of the ERCOT agreement and was predicated upon the fact that once a company enters interstate commerce some other State or Federal Authority may order interconnection regardless of the costs or benefits to the members of the Texas Interconnected System.

13. That if any one of the interconnected companies goes into interstate commerce all the interconnected companies are placed in interstate commerce.

14. That each company should have the choice of operating in the mode which best serves the interest of its customers.

15. That WTU is currently, and was prior to May 3, 1976, operating in intrastate commerce through its southern division, and in interstate commerce through its northern division.

16. That any party to the interconnected system which wishes to withdraw from such intrastate system should first furnish the Commission with complete plans for such withdrawal, together with the costs thereof, as well as sufficient engineering data to establish the reliability of service after withdrawal.

17. That each company in the TIS should have the right to operate in interstate commerce if it so desires provided that it does not increase the costs or lessen reliability to its rate payers as the results of such operations, and provided further

that it first withdraws from the Texas Interconnect System.

18. That all the members of TIS were also members of ERCOT and such interconnections being conditioned on contracts between the various parties, such contracts are presumed to be valid until set aside or voided by a court of general jurisdiction.

19. That the mode of operations by WTU after May 4, 1976, was not in the public interest or the interest of its rate payers, but was done for the benefit of the corporate interest of Central and Southwest Corporation, the holding company owning its common stock.

20. That the mode of operation of WTU subsequent to May 4, 1976, caused the dissolution of the TIS resulting in loss of reliability and increased operating costs for the customers of all the members of the system.

21. That the radial tie into Oklahoma from WTU's southern division did not serve any interest except the Corporate interest of Central and Southwest Corporation, the holding company for WTU and CP&L.

22. That the radial tie into Oklahoma from WTU's southern division on May 4, 1976, resulted in dissolution of the Texas Interconnect System and increased operating costs to all rate payers of all the members of such system.

23. That WTU gave no notice to any other member of the TIS of the radial tie into Oklahoma because the purpose of such tie was to force all members of such system into interstate commerce for the benefit of the corporate interest of Central and Southwest Corporation.

24. That synchronous operations between WTU and the Southwest Power Pool which began August 28,

1976, and continued to January 22, 1977, was unsatisfactory for WTU and all companies interconnected with them because of the wide power swings and delayed stabilization time after an outage.

25. That the corporate interest of Central and Southwest Corporation and the public interest are not necessarily parallel.

26. That the public interest requires electric utilities to maintain such transmission interconnections as are helpful to the reliable and efficient utilization of existing and proposed generation and transmission capacity.

27. That the series of interconnections between and through the TIS has been relied upon historically to provide, and is presently capable of providing the interconnections necessary for the efficient and reliable utilization of the generation and transmission capacity of the electric utilities heretofore interconnected to said system.

28. That the present plant of utilities connected by and through the generation and transmission network of the TIS as of May 3, 1976, is designed in reliance upon said network and depends upon maintenance of said connections for its reliable and efficient operation.

29. That no other system of interconnections is in place or proposed which will reliabily [sic] and efficiently utilize the generation and transmission capacity of existing or proposed plant of the electric utilities heretofore connected.

30. That construction of planned new generation and transmission capacity essential to meet future load growth, and to implement necessary conversion to fuels other than natural gas, requires certainty that the utility systems connected together in the

TIS will remain so interconnected or substantially so, henceforth, insofar as can now be forseen.

31. That the TIS was founded and based upon contractual conditions, either directly or through ERCOT terms and conditions for membership, and its dissolution resulted from the breach of such contractual conditions by WTU.

32. That since the TIS, either directly or through the ERCOT agreements, is founded upon contracts between parties hereto, even if WTU and CP&L claim such contracts are void or voidable as being against public policy, until such contracts are adjudicated to be void or voidable by a final judgment of a court of competent jurisdiction, this Commission should not require a reconnection which would force any party to waive its rights under a contract entered into in good faith between the parties hereto with respect to the formation and operation of such system.

33. That there is presently pending in the Federal District Court for the Northern District of Texas, sitting at Dallas, Texas, an action to determine whether such contracts are void or voidable, and this Commission has neither the jurisdiction nor the inclination to pre-empt said Court on the matter.

34. That a radial tie off WTU's southern division system which on May 1, 1977, was serving few customers in Oklahoma had no significant economic impact, and since the Order in Federal Power Commission Docket No. E-9583 had no jurisdictional impact, but was maintained solely for the purpose of precluding a reconnection of the TIS unless all other parties should agree to waive their contract rights as to the character and operation of such system.

35. That this Commission is not concerned with the question of whether the TIS or any member thereof operates in intrastate or interstate commerce, but instead is concerned only with the public interest.

36. That the radial tie from WTU's southern division into Oklahoma is contrary to the terms and conditions of the ERCOT agreement which constitute a part of WTU's contract with other members of the TIS and is an impediment to the reconnection of such system and is not in the public interest and should be removed or disconnected.

37. That to order a reconnection of the TIS without the removal of such radial tie would compel TP&L, DP&L, TESCO and HL&P to operate contrary to the terms of their interconnection contracts, and would in effect usurp the rights of the Federal District Court to pass on the validity of such contracts.

38. That existing transmission facilities of WTU are not capable of sustaining synchronous operations between the utility systems connected through the TIS and those connected through the Southwest Power Pool, and the additional high-voltage transmission facilities which would be necessary in Texas electrically to sustain such synchronous operations are not presently in place or under construction or covered by certificates of convenience and necessity or by applications for such certificates.

39. That the existing plant of CP&L is not capable of providing reliable low-cost electric power and energy if disconnected from the generation and transmission interconnections which existed through the TIS as of May 3, 1976.

40. That the public interest requires the maintenance of the series of interconnections existing on May 3,

1976, between the electric utilities then interconnected by and through the TIS.

41. That pursuant to the interim order of this Commission of May 2, 1977, the interconnections of the TIS have been restored as they existed on May 3, 1976, and that WTU has disconnected its northern division facilities from that portion of its system interconnected with the TIS.

42. That CP&L and WTU have given notice of their intention to challenge the authority of this Commission to enter any order affecting in any way the flow of electricity across state boundaries on the grounds that such orders are violative of the supremacy clause and the commerce clause of the Federal Constitution.

43. That the period between May 3, 1976, and May 2, 1977, during which the TIS was bifurcated, was characterized by reduced reliability, increased spinning reserves, higher costs, and greater consumption of natural gas than had been the period preceding May 3, 1976; that such undesirable conditions can be expected to recur if this Commission were to permit the TIS again to be bifurcated.

44. Although at this time the Commission does not find an immediate need for the expansion of the TIS into a power pooling network, neither does this Commission reject its responsibility to provide for such an arrangement at such time in the future, if any, when it would benefit the rate payers of the State of Texas.

45. That the objections and exceptions to the final order herein contained in the motions for rehearing except to the extent adopted herein should be overruled for want of merit.

Conclusions of Law

1. That the Commission has jurisdiction over the parties.

2. That utilities which undertake to provide electric utility service in the State of Texas are under a duty to provide and maintain such service, instrumentalities and facilities as shall be adequate, efficient and reasonable for the provision of such service irrespective of whether such utilities also provide service to or receive service from other states or are subject to the jurisdiction of the Federal Power Commission.

3. That the State of Texas has the authority and power to insure that utilities providing service in this State meet their public utility duties irrespective of whether such utilities also provide service to or receive service from other states or are also subject to the jurisdiction of the Federal Power Commission and that such power and authority is vested in this Commission.

4. That the incidental and insubstantial effect upon interstate commerce of the exercise of such jurisdiction in this case does not constitute an undue burden on interstate commerce.

5. That this Commission has the power to compel interconnection of utilities in the public interest.

6. That the public interest requires this Commission to order the immediate and permanent reconnection of the interconnection between the utility systems comprising the Texas Interconnected System.

7. That this Commission has no jurisdiction to adjudicate the validity or invalidity of the contractual obligation of WTU to refrain from interstate sales of electric energy through its southern division system.

8. That there is no showing in this proceeding that the public interest requires or would justify this Commission in relieving WTU of its contractual obligations or requiring HL&P, TESCO, DP&L or TP&L to waive their contract rights within the standards pronounced in *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *High Plains Natural Gas Co. v. Railroad Commission of Texas*, 467 S.W. 2d 532 (Tex. Civ. App. — Austin 1971, *writ ref'd n.r.e.*).

ORDER

The following, therefore, is the ORDER of this Commission:

1. The Interim Order of this Commission of May 2, 1977, and the actions of the parties pursuant thereto, are confirmed and approved; the said Interim Order is now incorporated into this amended Final Order by reference.

2. All interconnections presently in existence between the utility systems comprising the TIS, together with all such future interconnections as may hereafter be established between them with the approval of this Commission shall henceforth remain connected, unless, upon application to this Commission and notice to all parties to this proceeding, this Commission shall find that and proposed disconnection would serve the public interest.

3. WTU may block over electric loads between its northern division system and its southern division system which does not result in the interstate transmissions or sale of electric energy by or at the southern division system.

4. WTU is prohibited from re-establishing a connection between the southern division of its system which is now connected to the TIS and the north-

ern division of its system being that segment which is not now so connected, unless:

A. The contractual prohibitions against interstate sales shall be finally adjudicated to be void or voidable.

B. This Commission shall authorize or the Federal Power Commission shall order a connection, or

C. A court of competent jurisdiction shall order WTU to take action inconsistent with the foregoing prohibition.

5. WTU operating through its southern division and all other operating utility systems connected with the TIS are prohibited from making connections with utility systems not so connected or with segments thereof and from providing service outside of their certificated areas, unless:

A. The service is authorized by specific provisions of The Public Utility Regulatory Act, Art. 1446(c) V.A.C.S.

B. The Federal Power Commission shall order such a connection or,

C. This Commission shall authorize such a connection or service, (a) to cope with an emergency or (b) upon application, notice to all parties hereto, and finding that the proposed interconnection or service would serve the public interest.

6. That any party to the interconnected system which wishes to withdraw and disconnect from such intrastate system shall furnish the Commission with complete plans for such withdrawal together with the costs thereof, as well as sufficient engineering data to establish the reliability of service after withdrawal and disconnection.

7. That such information required in Section #5 above shall:

A. Be given to the Commission at least thirty days prior to the planned withdrawal and disconnection,

B. Such notice of the planned withdrawal and disconnection shall be given to each member utility of the TIS at least thirty days prior to the planed withdrawal,

C. The cost information provided to the Commission shall be sufficient to allow the Commission to determine the probable economic impact of the planned withdrawal on the rate payers of both the withdrawing utility and the rest of the TIS utilities,

D. The engineering information provided to the Commission shall be sufficient to allow the Commission to determine the probable impact of the planned withdrawal and disconnection on the system reliability of both the withdrawing system and the rest of the TIS utilities.

E. The rest of the members of the TIS, within ten days of receiving notice from the member utility of its planned withdrawal and disconnection, shall file jointly or individually with the Commission, information regarding the probable impact of the planned withdrawal on system operating costs and system reliability, and notice of any significant changes in TIS operation which the planned withdrawal and disconnection will necessitate.

8. Members of the TIS shall file with the Commission every six months a report detailing the utility's fuel conversion program. The report should provide information on present fuel mix, conversion

achieved in the reporting period, and conversion scheduled in the coming period. Information should be provided for all available capacity and the actual capacity used. Information should be provided describing the utility's fuel acquisition program to meet the conversion schedule described. The reports shall be due January and July 1st of each year.

9. Members of the TIS shall file monthly with the Commission a record of all forced outages experienced by the utility during the reporting period. The report should include the date, size (MW) duration and probable cause of the outage. The report shall also provide the MW remaining in service during the outage, the coincident system peak during the outage, and the percentage generating capacity reserve of the system at its lowest point during the outage. The report should detail any load interruptions, frequency changes, or other alterations in normal service, if any, which were undertaken by the utility during the period of outage. The report shall be due at the Commission not more than thirty days after the reporting period.

10. Each party hereto which is connected to the TIS and which shall henceforth file an application with this Commission for certification of transmission facilities, shall give immediate notice to all other parties to this proceeding of the filing of such application.

11. Each numbered paragraph of this Order and each supplemental Order which may be entered pursuant hereto, is intended to be and is severable from each other numbered paragraph of this Order and each supplemental Order pursuant hereto. The invalidation of any numbered paragraph of this Order or of any supplemental Order which may be entered pursuant hereto, shall in no wise affect any other numbered paragraph of this Order or any other supplemental Order, but the same shall remain in full force and effect.

12. All motions, objections and requested findings of fact and conclusions of law not included in the above findings and conclusions are hereby overruled for want of merit of each of them.

13. The failure of any party or parties to make compliance with this Order shall subject the defaulting party or parties to all penalties provided in the law for violation of an Order of this Commission.

14. The motions for rehearing, except to the extent that the grounds therefor are incorporated in this Amended Final Order, are overruled for want of merit.

ENTERED AT AUSTIN, TEXAS, this 11th day of July, 1977.

SIGNED: /s/ GARRETT MORRIS
Garrett Morris

SIGNED: /s/ ALAN R. ERWIN
Alan R. Erwin

SIGNED: /s/ GEORGE M. COWDEN
George M. Cowden

ATTEST:

/s/ ROY J. HENDERSON
Roy J. Henderson
Commission Secretary and
Director of Hearings

Appendix G

SUMMARY OF ADMINISTRATIVE PROCEEDINGS AND RELATED LITIGATION INVOLVING CENTRAL AND SOUTHWEST CORPORATION, TEXAS UTILITIES COMPANY AND HOUSTON LIGHTING & POWER COMPANY

1.

Securities and Exchange Commission Administrative Procedure File No. 3-4951

On March 26, 1974, a motion was filed with the SEC by the Oklahoma Cities of Altus, Frederick, Cordell and Mannford and Verdigree Valley Electric Cooperative and Indian Electric Cooperative, Inc. requesting, among other things, that the SEC undertake a review of the status of Central and South West Corporation ("CSW") and its subsidiaries under the Public Utility Holding Company Act of 1935 ("1935 Act").

On December 31, 1975, CSW filed a memorandum with the SEC reporting on the conclusion of an initial engineering study undertaken by a consulting firm for CSW which evaluated several alternative modes of future operation of its system, some of which involve interconnecting facilities of the subsidiaries of Texas Utilities Company ("TU") and adjacent utilities, with existing and proposed interstate facilities of CSW.

On January 30, 1976, the SEC issued a Notice of and Order for Hearing relating to the economical operation of the electric utility facilities of the subsidiaries of CSW as a single integrated and coordinated system under the 1935 Act and the various plans referred to in the memorandum.

A pretrial conference in this case was scheduled on May 12, 1976, one week after the events triggered by WTU's commencement of interstate service from its Texas intrastate system on May 4, 1976. The issues are:

1. Whether the electric utility facilities of the subsidiaries of CSW, supplemented as planned or proposed, are capable of being economically operated as a single integrated and coordinated system;
2. Whether the proposals presented by CSW and its subsidiaries, with any amendments or modifications which may be developed during the proceeding, represent a reasonable prospect of achieving such economical operation, and what contingencies, if any, may affect carrying out any of such proposals.
3. Whether the Commission's determination of February 16, 1945, that the electric utility facilities of C&SW's subsidiaries constituted a single integrated system should be modified or set aside in the event the record in this proceeding does not support a finding now that those facilities are operated as a single integrated system or are capable of such operation under any of the proposals that C&SW has presented to comply with the standards of Section 11(b)(1).

2.

DALLAS FEDERAL DISTRICT COURT SUIT

Hearings in this proceeding have occurred in October 1976, January, February, May and September 1977, and in February and March 1978. Additional hearings are scheduled to resume in December 1978 at which time CSW will complete its direct case.

Texas Electric Service Company and Houston Lighting & Power Company were named defendants in a suit filed against them on May 3, 1976, in the U.S. District Court for

the Northern District of Texas, Dallas Division, by WTU and CP&L. The suit alleges that the maintenance of a policy to operate solely within the State of Texas constitutes an unlawful restraint of trade on a group boycott and concerted refusal to deal in violation of Section 1 of the Sherman Act. The suit generally seeks to require TESCO and HL&P to operate interconnected with the interstate facilities of WTU and CP&L. The Court denied Plaintiffs' request for a temporary restraining order and preliminary injunction. All parties filed motions for summary judgment, all of which were denied by the Court on June 14, 1977. A trial on the merits is scheduled to begin on October 2, 1978.

3.

Public Utility Commission of Texas
Docket No. 14

After being informed that WTU had connected service across the Oklahoma state line and that the TU companies and HL&P had disconnected from the Texas Interconnected System ("TIS") because of this, the PUC called an emergency hearing for May 7, 1976, at which all members of TIS were represented. At the conclusion of this hearing, the PUC found that the interest of the public required the immediate reestablishment of an intrastate interconnected system among the companies which wished to continue to operate intrastate only and issued an interim order requiring, among other things, those members of the TIS wishing to remain in intrastate commerce to commence negotiations immediately for the reestablishment of an intrastate interconnected system, and directing all parties to advise the PUC by May 21, 1976, of the steps taken in this regard. Following receipt of responses from all parties, the PUC, on May 24, 1976, found, among other things, that a Texas

intrastate interconnect system had been reestablished by the reconnection of HL&P and the TU companies and issued a final order permitting, among other things, the reconnection of the other members of TIS with such intrastate system provided any such reconnection did not put the intrastate system into interstate commerce.

On January 7, 1977, DP&L, TESCO and TP&L filed a motion with the PUC requesting that the PUC enter an order requiring WTU and CP&L (i) to appear and show cause why they should not be ordered to return to the pre-May 4, 1976 mode of operation and, pending final outcome of the proceeding, (ii) to cease implementing any plans which would facilitate in any manner interconnected operation with any electric utility outside the State of Texas. The motion alleged that unless the requested order were issued, the conduct of WTU and CP&L may frustrate the proper exercise of PUC jurisdiction and cause irreparable injury to, and result in a significant adverse impact upon, all electric utilities in the State of Texas and their customers. HL&P, LCRA and others also filed similar motions.

At a hearing held on May 2, 1977, the PUC entered an Interim Order in effect requiring all parties to return to the pre-May 4, 1976 mode of operation and WTU to sever its interstate tie into Oklahoma.

On June 2, 1977, following a full hearing, the PUC issued its Final Order which, among other things, confirmed its Interim Order. On July 11, 1977, following a hearing on various motions for rehearing, the PUC entered an Amended Final Order (which is Appendix F) which clarified but did not substantively change its June 2 Final Order. On July 22, 1977, CP&L and WTU filed a motion for rehearing of the Amended Final Order which was denied.

In May, 1977, CP&L and WTU instituted a statutory appeal to the District Court of Travis County, Texas, seeking to set aside the Interim Order issued by the PUC on May 2, 1977. The Plaintiffs' petition was amended on August 2, and September 16, 1977, seeking to set aside the Amended Final Order entered by the PUC on July 11, 1977, and the Interim Order as incorporated therein. The TU companies and HL&P intervened as Defendants in this proceeding in October, 1977. Oral Arguments are scheduled to be heard in this proceeding on November 20, 1978.

In May, 1977, CP&L and WTU also filed a complaint against the PUC in the United States District Court for the Western District of Texas, Austin Division, seeking a declaratory judgment that the Interim Order entered by the PUC is void. On July 29, 1977, CP&L and WTU amended their complaint to seek a declaratory judgment that the Amended Order of July 11, 1977, and the Interim Order as incorporated therein, is void. In October, 1977, the TU companies and HL&P intervened as Defendants in this appeal. In early May, 1978, the United States and the Federal Energy Regulatory Commission intervened as Plaintiffs therein. Upon the motion of the Defendant PUC, joined in by the TU companies, HL&P and other parties which intervened as Defendants, the Court, on May 11, 1978, dismissed the appeal without prejudice to the refiling thereof after the Texas courts have addressed the state law questions in the case. This action by the U.S. District Court is on appeal to the Court of Appeals for the Fifth Circuit.

4.

Nuclear Regulatory Commission
Docket Nos. 50-498A and 50-499A

CP&L is one of four holders of a joint license issued by the Nuclear Regulatory Commission to construct the South

Texas Project, a two-unit nuclear generating station near Bay City, Texas. CP&L, on June 4, 1976, filed a petition to intervene and request for hearing out of time with the NRC, requesting the NRC to conduct an antitrust hearing as a part of construction permit proceedings for the South Texas Project. A Licensing Board of the NRC granted CP&L's request and ordered a hearing. Upon appeal, the Atomic Safety and Licensing Appeal Board, by its Decision dated March 18, 1977, reversed the order granting a hearing and directed that CP&L's petition be dismissed for lack of jurisdiction. CP&L sought and was denied an extension of time to seek reconsideration of the Safety and Licensing Board's order and a request for reconsideration was subsequently denied. Review by the NRC is discretionary and on March 31, 1977, it announced that it had decided not to review the decision of the Safety and Licensing Appeal Board. On May 18, 1977, CP&L petitioned the United States Court of Appeals for the District of Columbia Circuit to review the NRC orders and remand the cause to the NRC with directions to hold a prompt hearing on the antitrust issues raised by CP&L. HL&P has intervened in this appeal.

HL&P, a co-holder of the permit for the construction of the South Texas Project, filed a request on February 10, 1977, with the NRC for a waiver of an NRC rule which would permit the NRC Staff to initiate the operating license antitrust review for the South Texas Project under section 105(c) of the Atomic Energy Act of 1954, as amended. CP&L, in response to the request for waiver, urged that the NRC Commissioners should order a hearing with respect to the antitrust issues raised by its petition to intervene outside the confines of an operating license review under section 105(c) of the Atomic Energy Act of 1954, as amended. The NRC entered an order on June 15, 1977 in

which it declined to direct a hearing, granted HL&P's request for waiver and directed the NRC Staff to seek the further advice of the Department of Justice with respect to the operating license antitrust review for the South Texas Project. On July 26, 1977, CP&L petitioned the United States Court of Appeals for the District of Columbia Circuit to review the June 15, 1977 order of the NRC and remand the cause to the NRC with directions to hold a prompt hearing on the antitrust issues raised by CP&L. CP&L also moved to consolidate this petition for review with the petition for review filed by it on May 18, 1977. The two petitions for review filed by CP&L have been consolidated and briefs have been filed by the parties.

By letter dated February 21, 1978, the Department of Justice, in response to the request of the NRC Staff pursuant to the above-mentioned Order of June 15, 1977, rendered the requested advice, indicated that the intrastate provisions of agreements among TIS members may raise serious antitrust issues, and concluded that changed circumstances required that an antitrust hearing be held on the operating license application. Thereafter, a Notice of Antitrust Hearing on Operating License Application was published in the Federal Register on April 14, 1978. Texas Utilities Generating Company, DP&L, TESCO and TP&L filed a petition to intervene in this proceeding (Docket Nos. 40-498A and 50-499A) on April 28, 1978. By Answer, dated May 16, 1978, the NRC Staff has opposed the petition to intervene filed by the TU companies.

On May 17, 1978, the Atomic Safety & Licensing Board issued a Notice of Special Prehearing Conference in this proceeding to be held on June 21, 1978, at which conference the Board will consider, among other things, the identifica-

tion of key issues in the proceeding, the ruling on intervention petitions, and the establishment of a schedule for further actions in the proceeding.

5.

Other FPC (FERC) Proceedings

Various other motions and petitions are pending seeking relief substantially the same as that sought in the May 4, 1976 and May 13, 1976 petitions of the CSW subsidiaries, as follows:

1. *Docket No. E-9593.* On April 27, 1977, CP&L, PSO, SWEPCO and WTU filed an Emergency Petition for Proceedings and Joint Hearings Pursuant to Sections 307 and 209(B) of the Federal Power Act, requesting that the Commission initiate a proceeding to conduct joint hearings with the Public Utility Commission of Texas concernng the question of intrastate and/or interstate service of Texas interconnected public utility systems raised by the motions filed with the Texas PUC by HL&P and the TU companies on January 7, 1977. This petition was denied by order of the Commission dated July 5, 1977. On July 22, 1977, the Corporation Commission of the State of Oklahoma filed an application for rehearing of the July 5 order, claiming that in its petition to intervene, in addition to its request for intervention, it requested the Commission to institute an investigation pursuant to Section 207 of the Federal Power Act "to determine whether or not adequacy or sufficiency of service to the people of the State of Oklahoma has been affected by the recent disconnection of service between WTU and PSO." The Corporation Commission stated that the Commission failed to address this request in its July 5 order. On August 1, 1977, the Oklahoma Association of

Electric Cooperatives filed an application for rehearing for the same reason, among others, stated by the Corporation Commission. On August 4, 1977, the CSW subsidiaries applied for rehearing of the order for the same reason as the Corporation Commission. On August 18, 1977, the FPC issued an order granting rehearing solely for the purposes of further consideration.

3. Docket *No. E-9578.* On December 22, 1976, Tex-La Electric Cooperative, Inc. filed a petition with the Federal Power Commission, requesting the Commission to commence an investigation to determine whether TP&L engages in interstate commerce, and to determine whether TP&L's wholesale sales are subject to the jurisdiction of the Texas Public Utility Commission or the jurisdiction of the Federal Power Commission, alleging that TP&L receives energy from the Denison Dam, and the "Denison Dam is located in Oklahoma and Texas." On the same date Tex-La filed a similar petition with the Texas Public Utility Commission. Tex-La represents 14 rural electric cooperatives engaged in the distribution and sale of electric power and energy. Tex-La purchases power and energy for the use and benefit of its member cooperatives from TP&L pursuant to a contract dated June 12, 1973. On January 25, 1977, the subsidiaries of CSW and certain Oklahoma consumers filed petitions to intervene in this proceeding. TP&L filed answers asserting that the Tex-La petition should be denied because no jurisdictional interstate energy had been transmitted into or out of the TU system. On October 31, 1977, the Federal Energy Regulatory Commission (successor to the FPC) issued an order, a copy of which is attached as Attachment 4, stating that the issue raised as to the interstate character of transactions in Denison Dam energy was not disposed of by prior FPC orders, permitted intervention

by certain CSW subsidiaries and others, and ordered a public hearing now scheduled to commence in 1979, concerning the investigation of matters contained in the Tex-La petition relating to whether there has been jurisdictional transmission of interstate energy into or out of the TU system through facilities at Denison Dam.